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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/755,736	01/12/2004	Leslie G. West	67302	1105

22242 7590 09/14/2005

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EXAMINER	
PRATT, HELEN F	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 09/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/755,736	WEST ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-20 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-20 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 3, 5, 6, 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Johnston (4,267,196).

Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston discloses a process of making a fruit precursor by comminuting the precursor and digesting it and combining with a water soluble digesting agent and other ingredients, freeze drying the product and grinding the dry product (pulverizing)(abstract and col. 4, lines 47-53 and col. 8, lines 26-42). A diluting agent can be added to the precursor to maintain the viscosity of the product (col. 4, lines 53-58, col. 5, lines 14-28, as in claim 2). The product can be incorporated into a fruit juice (col. 8, lines 5-12).

Ingredients are seen to be released from the matrix as in claim 3 since the precursor is comminuted.

The product is packaged as in claim 5, as it goes to the packaging room (col. 8, lines 39-41).

The product as in claim 6 can be added to a liquid since the reference states that it can be added to fruit juice.

Freeze drying includes the step of drying under a vacuum in order to sublimate the liquids as in claim 8.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-18 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnston (4,267,196) in view of Horigane (6,098,410).

The limitations of claims 1, 2, 3, 5, 6, 8 have been discussed above and are obvious for those reasons. Horigane discloses a process of making a freeze- dried product from vegetables by mixing and crushing the material with dry ice and freezing with a vacuum drying apparatus (col. 7, lines 45-55 and abstract). Claim 4 further requires removing unwanted particles from the matrix. Nothing new is seen in removing unwanted particles, such as fiber, seeds, etc from the product in a process known as sieving, which is commonly done to fruits and vegetables. Therefore, it would have been obvious to remove unwanted particles from a composition.

Claim 7 further requires mixing the beverage powder with water. However, water is very well known in a beverage, and the reference to Johnston, discloses mixing the product with juice as above. Juice of course is mostly water. Therefore, it would have been obvious to mix the powder with other liquids such as water.

Claim 9 further requires heating the puree during vacuum drying. Horigane discloses that it is known to raise the temperature of the frozen product (heating) during vacuum drying to temperatures of 20-50 C as in claim 10 (col. 7, lines 56-70). Freezing temperatures of –50 C are disclosed in claim 10(col. 7, lines 60-70). No patentable distinction is seen in –40 c and –50 C at this time absent anything new or unobvious. A vacuum of 20 times 10 to the –8 Bar is disclosed (col. 12, lines 9-15). Therefore, it would have been obvious to use the process of Horigane in the freeze- drying process of Johnston.

Claim 11 further requires making the beverage powder match a target color. Horigane discloses comparing the freeze-dried products to reference colors as in Table I., Col. 12, lines 15-55. The actual color was disclosed being compared to a target color. Not using the beverage powder, if it did not match the target color is seen as being within the skill of the ordinary worker. The further limitations of claims 12-15 have been disclosed above and are obvious for those reasons. Therefore, it would have been obvious to make the powder to a target color as disclosed by the reference.

Claim 11 is also a product by process claim. The fact that the procedures of the reference are different than that of applicant is not a sufficient reason for allowing the product-by-process claims since the patentability of such claims is based upon the product formed and not the method by which it was produced. See In re Thorpe 227 USPQ 964. The burden is upon applicant to submit objective evidence to support their position as to the product-by-process claims. See Ex parte Jungfer 18 USPQ 2D 1796.

the composition has been shown above by the combined references and is obvious for those reasons.

Claims 16 and 17 further require that the target color is based on a liquid medium with which the powder is to be mixed. However, nothing new is seen in choosing a color in a liquid medium to compare the inventive powder with, as matching colors is well known. Therefore, it would have been obvious to match the colors as claimed.

Claim 18 further requires that the powder is made from particular fruits or vegetables. Horigane discloses that it is known that dried vegetables suffer denaturation from previous known treatments (col. 1, lines 50-55). Johnston discloses a method of treating citrus fruits, pineapple and bananas (abstract). Nothing new is seen in using the claimed vegetables absent a showing that the method of the combined references would not be appropriate for the claimed vegetables and fruits. Therefore, it would have been obvious to use other fruits and vegetables in the process of the combined references since the claimed ones are also fruits and vegetables.

Claim 20 is to the apparatus. Johnston discloses a process that uses the claimed means (col. 8, lines 32, 40, 41, col. 11, lines 40-55). . Horigane also discloses an apparatus for making a freeze-dried product (drawings 1-5). Claim 20 differs from the references in that the powder is mixable with a liquid medium. However, this limitation is not given weight in an apparatus claim. Means are considered to have been shown, as some type of apparatus must have been used to freeze dry and perform the other processes. Therefore, it would have been obvious to make the product as claimed

Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Pusateri et al. or Zaleski (0008324) or Institute de Recherches (1343640).

Pusateri et al. disclose a powder made of vegetables (abstract and col. 2, lines 46-55). Zaleski et al. disclose a spray-dried product, which is seen to have been powdered because spray drying makes a powder. (abstract).

The institute de Recherches '640 discloses a composition, which can be made into a beverage (page 3, lines 100-115).

The claims differ from the references in the particular process used. However, as above in In re Thorpe, only the composition needs to be shown. The limitation that the powder is a "beverage" powder is shown in that the claimed composition is shown. Therefore, it would have been obvious to use different methods to make a powdered beverage composition.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 9-8-05

HELEN PRATT
PRIMARY EXAMINER